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Stephen J. Morse

University of Pennsylvania Carey Law School

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Justice, Mercy, and Craziness

Stephen J. Morse*

MADNESS AND THE CRIMINAL LAW. By Norval Morris. Chicago: University of Chicago Press. 1982. ix + 235 pp. \$20.00.

In *Madness and the Criminal Law*, Norval Morris addresses the vexing legal problems created by the interaction between mental disorder and criminal behavior. Using short stories in the mode of the early George Orwell, and standard legal analysis, Professor Morris artfully considers the relationship between legal and moral guilt, the insanity defense, the relevance of mental disorder to sentencing, the role of mercy in punishment, and whether the criminal justice system should treat like cases alike. The book is charming, humane, and often elegant. Professor Morris usually, but regrettably not always, recognizes when his exposition requires an argument rather than simply a conclusion.

I agree with Professor Morris on many matters. For example, we share an admiration for Orwell and a distaste for current competence-to-stand-trial procedures, sexual psychopathy laws, confusing diminished capacity doctrines, and the guilty but mentally ill verdict. Nevertheless, we disagree about many important issues, such as the need to maintain the insanity defense, the role of desert in sentencing, and the function of mental abnormality in attributing blame and apportioning punishment. In this review, I shall try to identify the sources of our disputes and the problems Professor Morris does not resolve despite the erudition and vigor of his arguments.

I. THE INSANITY DEFENSE

Professor Morris rejects using a hybrid of the mental health and criminal justice systems to respond to criminal behavior. He believes that hybrids produce both injustice and practical conse-

* Orrin B. Evans Professor of Law, and Professor of Psychiatry and the Behavioral Sciences, University of Southern California. A.B. 1966, Tufts; J.D. 1970, Ph.D. 1973, Harvard University.

quences worse than those produced by either system functioning alone. Professor Morris' solution is to treat criminal law violations solely within the criminal justice system. Thus, competence-to-stand-trial proceedings would be radically altered to permit all offenders to come to trial quickly.¹ More radical yet, Professor Morris would abolish the insanity defense.² Mental disorder would be considered at trial only insofar as it negated mens rea, and at sentencing. Although Professor Morris is a leading and sophisticated advocate for the abolitionist position, I believe he is nonetheless mistaken according to his own theoretical standards.

Let us consider our points of agreement first, however. Professor Morris correctly notes that while the insanity defense is raised in very few cases, the amount of time and resources it requires and the concern it generates are grossly disproportionate to its importance.³ The result of a successful insanity plea—usually commitment to a maximum security state hospital for the criminally insane—is often less therapeutic and pleasant than a prison sentence. Moreover, some defendants may not raise the insanity defense or succeed at it when they should, while others who should be convicted and punished win acquittal. Furthermore, many disordered prisoners who did not raise it (or did not do so successfully), but who need treatment, do not receive it. I agree, in short, that there are many practical problems, some of which abolition would remedy.

But even if abolition is practical, is it just? This is a fair question to ask of Professor Morris because he employs a theory of criminal sanctions that considers just deserts as well as conse-

1. Pp. 44-53. I substantially agree with this proposal. More injustice is done under the current slow and psychiatrically unjustified incompetence procedures than would be created by trying incompetent defendants.

2. Although the Hinckley verdict has made it fashionable to propose abolishing the insanity defense, Professor Morris had suggested abolition long before that event. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 176-85 (1970); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 516-28 (1968).

3. As a practical matter, if a jurisdiction adopted both a reasonable partial-responsibility variant of diminished capacity that applied to all crimes, and a fair and workable indeterminate sentencing scheme, an insanity defense would be necessary in very few cases. Nevertheless, as I shall argue below, the insanity defense should be retained for moral reasons, even if it applies to very few cases. I also believe that a partial-responsibility defense is unwise, see Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 28-36 (1984), and that a fair and workable indeterminate sentencing scheme is impossible, see notes 24-59 *infra* and accompanying text.

quentialist results. Indeed, he directly confronts "the question of fairness, the sense that it is unjust and unfair to stigmatize the mentally ill as criminals and to punish them for their crimes,"⁴ but the argument that abolition is just fails.

To understand why, we must first briefly address the moral foundations of the insanity defense. It is based on general principles of excuse that our society considers fundamental. The preconditions for responsibility for actions are that an actor be minimally rational (a cognitive capacity) and minimally capable of self-control (a volitional capacity). For example, infants and some demented persons are not thought to be morally guilty for the harms they cause precisely because they lack these capacities.⁵ Similarly, an adult who causes a harm while distraught because of a personal tragedy will typically be considered less responsible than if he or she had been rational and in control. Criminal law defenses concerned with the defendant's conduct are based on the same principles. We excuse a defendant whose acts were the product of cognitive (e.g., infancy) or volitional (e.g., duress) circumstances that were not his fault.⁶

The question, then, is whether in some cases extreme craziness at the time of the offense so compromises the defendant's rationality or self-control that it would be unjust to hold him or her responsible. Professor Morris admits that there "is indeed some quite florid psychopathology [i.e., crazy behavior] . . . among those for whom these pleas are made . . ."⁷ and that it would be unjust not to mitigate their punishment,⁸ because, I presume, they are less responsible. These admissions concede that craziness can affect one's cognitive and volitional capacities for responsibility. If craziness can mitigate responsibility, why should it not excuse the defendant altogether in an extreme case? On what theory of responsibility can we hold accountable the small number of persons who offend under the influence of extreme craziness?⁹

4. P. 61.

5. We may restrain such persons to prevent them from causing harm in the future, but we would not consider such restraint punishment that has been imposed because it is deserved.

6. This view of human responsibility for action traces its long history at least back to Aristotle. See ARISTOTLE, *The Nichomachean Ethics*, bk. III, ch. 1 in INTRODUCTION TO ARISTOTLE 338, 385-90 (2d rev. ed. 1973).

7. P. 83.

8. Pp. 146-60.

9. It is possible, of course, that Professor Morris might concede that although cra-

Professor Morris argues that it is just to hold mentally disordered persons responsible for their actions because they have sufficient freedom to choose their behavior.¹⁰ His argument is that other causes of crime, such as social disadvantage, are far more criminogenic than mental disorder (including severe disorder), yet we do not excuse those who are poor or the products of broken homes. Why, then, should we excuse the mentally disordered?¹¹ Professor Morris concludes that "[a]s a rational matter, it is hard to see why one should be more responsible for what is done to one than for what one is."¹² This conclusion is surely correct, but it does not follow from its premise, which is based on morally irrelevant comparisons between disadvantaged and crazy persons.

Professor Morris confuses causation with excuse, a mistake about responsibility that has consistently bedeviled criminal law theorists. But causation is not an excuse, for, presumably, all behavior is caused. If causation were an excuse, no one would be held responsible for any behavior, criminal or otherwise.¹³ Moreover, causation is not the equivalent of the subspecies of excuse that we may term compulsion.¹⁴ Compulsion occurs

ziness can diminish responsibility somewhat, it can never do so entirely. Nevertheless, it is difficult to imagine what moral argument would support holding responsible a defendant who is wildly out of touch with reality at the time of the offense. Professor Morris does not provide such an argument. Moreover, he would excuse entirely a person grossly out of touch with reality as a result of involuntary intoxication.

10. The locution "freedom of choice" is Professor Morris'. P. 61. I find such locutions, including those that refer to free will or its absence, as conclusory or confusing. Although much of the insanity defense debate is expressed in terms of free choice and similar phrases, I am never sure what freedom of choice means. How does it relate to compulsion or theoretical conceptualizations of determinism? Determinism does not entail a finding of compulsion or absence of choice.

11. P. 63.

12. *Id.*

13. I am arguing here for the position in philosophy known as "compatibilism," i.e., that determinism does not negate individual responsibility. See A. KENNY, *FREE WILL AND RESPONSIBILITY* 22-45 (1978); A. AYER, *Freedom and Necessity*, in *PHILOSOPHICAL ESSAYS* (1963). For a discussion of these issues in a related context, see Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 1027-30, 1033-37 (1982). To use the terminology in *Failed Explanations*, Professor Morris is a "selective determinist" or a "selective compulsivist"; that is, he believes that only some people are determined. Moreover, his position identifies him as a "partial incompatibilist"—one who believes that determinism and responsibility are antithetical in those cases where the person's behavior is caused. This position is theoretically incoherent, however. See Moore, *Determinism and the Excuses*, — CALIF. L. REV. — (forthcoming, 1985).

14. See sources cited in note 13 *supra*.

when the person faces a regrettable hard choice that leaves him no reasonable alternative to wrongdoing. Clearly, if causation were compulsion, no one would be responsible for his acts because all behavior is caused and thus all would be compelled.

But causation is not the issue: Nonculpable lack of rationality or self-control is. Professor Morris' conclusion that a person should not be more reponsible for what is done to him than for what he is does indeed follow from *this* premise. Consider the case of a person whose extreme irrationality is the product of having involuntarily, unknowingly ingested a powerful hallucinogen. The law holds, and Professor Morris agrees, that this defendant, who is not responsible for what has been done to him, is not responsible for his consequent crime. If this is correct, as Professor Morris argues, how can we distinguish the case of a person who commits a crime in response to motivations produced by a severe mental disorder, say, a sudden command hallucination buttressed by a consistent delusional belief that the action is necessary?¹⁵ If it is proper to excuse an involuntarily drug-intoxicated person, a crazy defendant, who is similarly not responsible for what he is, should also be excused. The deluded defendant is also the "victim" of his disorder, which has "done something" to him. In both cases the defendant is excused not because the behavior is caused, but because the defendant was sufficiently irrational and not responsible for the irrationality.

The reason we do not excuse most disadvantaged criminals (or other persons whose criminality can be causally explained) is not our lack of sympathy for their unfortunate backgrounds, or our failure to recognize that social disadvantage is a powerful cause of crime, as surely it is.¹⁶ Rather, we hold most disadvantaged defendants responsible because they possess minimal rationality and self-control. A disadvantaged defendant "driven crazy" by his life circumstances will be excused because he is crazy, not because he is disadvantaged or because his behavior was caused. Similarly, most mentally disordered persons are

15. The hypothetical assumes that the deluded defendant was unable to take steps in advance to control his irrationality. Cf. *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956) (automobile driver had epileptic seizure and killed pedestrian).

16. See Cantwell, *The Offender*, in U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 29, 36-38 (1983). See generally G. NETTLER, EXPLAINING CRIME 128-62 (2d ed. 1978) (describing the inverse correlation between social advantage and crime rates, but questioning some of the usual interpretations of these data).

held responsible for acts influenced by their disorder because, despite it, they are sufficiently in control and rational to meet the low, threshold standards for responsibility.¹⁷

If the defendant was extremely irrational or out of control at the time of the offense, we do wish to know whether the defendant was responsible for his or her incapacity. Thus, a defendant will not be entirely excused if his incapacity is due, for example, to his voluntary and knowing ingestion of a strong hallucinogen¹⁸ or his failure to follow a prescribed medical regimen.¹⁹ But if the irrationality is the product of extreme mental disorder, over which, to the best of our knowledge, the person has little control, then the person should be entirely excused.

The mens rea approach that Professor Morris suggests—using evidence of mental disorder solely to negate mens rea—is not an appropriate substitute for the insanity defense. Even the craziest defendants, such as our hallucinating and deluded actor, usually have the mens rea required by the highest crime charged (they may kill with premeditated intent, although for the craziest reasons).²⁰ Very few defendants, no matter how disordered, will obtain conviction of a lesser offense and a reduced sentence under the mens rea approach. Moreover, conviction of a lesser offense and reduction in sentence are insufficient responses to the clear injustice that convicting obviously disordered defendants will produce. On what adequate theory of desert can a grossly psychotic defendant receive more than the most minimal penalty, if any? Punishing a defendant more than he deserves for fear of “depreciating the seriousness of the offense” abandons any constraints desert would provide. Undeserved punishment will surely occur, however, because severely crazy defendants convicted of the most serious crimes must be given relatively substantial and thus disproportionately harsh penalties to avoid the depreciation effect. In addition, convicting and punishing nonresponsible defendants will create disrespect for the criminal law on fairness grounds if they are punished too harshly, or disrespect on consequentialist grounds if they are not punished

17. See generally Monahan & Steadman, *Crime and Mental Disorder: An Epidemiological Approach* in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145, 152–72 (M. Tonry & N. Morris eds. 1983) (discussing the relationship, or lack thereof, between crime and mental disorder).

18. See MODEL PENAL CODE § 2.08(2) (Proposed Official Draft 1962).

19. See *Regina v. Quick*, [1953] 3 W.L.R. 26 (Crim. App.).

20. Morse, *supra* note 3, at 38–44.

harshly enough. One can argue persuasively that even the craziest persons should be held accountable for their actions because they retain substantial ability to control their craziness and other behavior related to it.²¹ But in the criminal justice system, where liberty and stigma are at stake, we should give the benefit of the doubt to very crazy persons by retaining the defense.

The insanity defense must be retained because it is unfair to punish actors unless they deserve it. It is simply not just to convict and punish retributively those who are fundamentally and nonculpably irrational or out of control. Justice requires that efforts to abolish the defense should be redirected to reforming those aspects of it that Professor Morris, I, and others abhor. Abolition will not measurably improve the efficiency and honesty of the criminal justice system, nor will it lead to enhanced social safety or the proper treatment of disordered inmates. Rather, it is an admission of moral exhaustion that will lead to further disrespect for the view that persons must be treated as moral agents.

II. SENTENCING POLICY, MENTAL DISORDER AND MERCY

The bulk of *Madness and the Criminal Law*, including one of the two short stories that Professor Morris uses as illustrations ("The Brothel Boy"), addresses sentencing policy. As one who adopts a theory of punishment that blends desert and consequentialism, Professor Morris claims that desert can be no more than a limiting principle that sets a range of "not undeserved" punishments for each crime. Within that range, consequentialist concerns will appropriately dictate the punishment in a particular case. Professor Morris further believes that the defendant's mental disorder may both mitigate and aggravate the gravity of the offense, thus giving grounds for decreasing and increasing the sentence within the not undeserved range. Moreover, mercy must be exercised to temper justice, which Morris apparently equates with equality, lest the strict application of the law cause the greatest injury of all. Finally, Professor Morris argues that the virtues of treating like cases alike are overrated. Although he uses mental disorder as an example of how his scheme would apply, his core concern is to argue for his theory of sentencing and for the fairness of treating like cases unlike—what he calls "anisonomy."

21. See Morse, *Crazy Behavior, Morals & Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 564-89 (1978).

This review is not the appropriate place to rehash the ongoing and often fervent debate about the theoretical and practical merits of various sentencing policies. Instead, I wish to focus on the major arguments Professor Morris presents for using indeterminate sentencing, for rejecting the strong norm of equality in sentencing, and for using mental disorder and mercy to set proper sentences. There can be no perfect sentencing scheme, especially in a criminal justice system as flawed as ours. Nevertheless, the moral and logical appeal of treating like cases alike is so powerful that it takes enormously strong arguments to justify not doing so. To what extent are we willing, on both theoretical and practical grounds, to treat persons as means to ends and to accept the exercise of discretion? Professor Morris is clearly not a pure consequentialist nor does he advocate unbridled discretion; nevertheless, his system comes perilously close to a consequentialist and arbitrary scheme.²²

In the remainder of this review, I will suggest that Professor Morris provides insufficient justifications for (1) the general mixed theory of sentencing that leads to unequal sentences for defendants convicted of the same crime, and (2) the use of mental disorder and mercy to set sentences in individual cases. Instead, I propose that better definitions of crimes and defenses, coupled with reasonable, determinate sentences, will create a more just, although by no means perfect, system.²³ To demonstrate the validity of this contention, I shall conclude with a reanalysis of "The Brothel Boy," the moral tale that Professor Morris uses to prove the necessity for exercising discretion and mercy in sentencing.

22. As Professor Morris makes clear throughout the book, desert must play an important role in sentencing. Moreover, in an earlier discussion of sentencing policy using Rawls' "veil of ignorance" methodology, Morris wrote that "we should . . . subscribe to concepts of fairness and justice that preclude the sacrifice of the individual prisoner to a supposed larger social good." N. MORRIS, *THE FUTURE OF IMPRISONMENT* 83 (1974). These are the right sentiments, but they seem quite inconsistent with the system Professor Morris now proposes.

23. I should make it clear at the outset that I have no utopian expectations of a determinate sentencing scheme. As many critics have argued, determinate sentencing has a multitude of practical and theoretical problems. *See, e.g.*, J. HEWITT & T. CLEAR, *THE IMPACT OF SENTENCING REFORM: FROM INDETERMINATE TO DETERMINATE SENTENCING* (1983). Nor do I consider indeterminate sentencing incoherent. I simply believe that a determinate scheme, despite its problems, will operate more fairly and efficiently.

A. Sentencing Policy

The analysis in *Madness and the Criminal Law* is somewhat discursive, perhaps reflecting the book's provenance as a series of writings on related themes.²⁴ The book provides no single, systematic statement of Morris' argument for employing ranges of sentences and rejecting equality. Nevertheless, I believe that Professor Morris' argument rests on three related propositions, each being necessary and together all being sufficient to prove the superiority of his suggested scheme. First, desert cannot be a defining principle of punishment because it is too indeterminate. In other words, it is impossible to claim coherently that there is a specific deserved punishment for each criminal offense.²⁵ Second, no one really believes in equality of sentencing anyway, because we all accept numerous important exceptions to equality.²⁶ Third, parsimonious sentencing should and can be performed. That is, society should impose the least amount of suffering consistent with achieving our other, consequentialist social goals in punishing, a goal that is practically possible as well as just.²⁷ Let us consider each of these contentions in order.²⁸

First, Professor Morris makes the standard argument against accepting desert as a defining principle that yields a fixed punishment for each offense.²⁹ He notes that the usual yardsticks, such as the talionic law, or notions of paying the perpetrator back for the pain caused to the victim or society, fail as guides to punishment, and that ideas of just deserts are relative to time and place.³⁰ He is quite right. Few sophisticated persons would claim that there is an invariant, objective deserved punishment for each offensive act. But desert theorists only need to make a more modest claim: It is possible in any society to rank the seri-

24. Professor Morris developed many of the arguments in his previous articles and books. See, e.g., N. MORRIS, *supra* note 22; Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161 (1974); Morris, *supra* note 2; Burt & Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972). Chapters 2, 4, and 5 of *Madness and the Criminal Law* modify and expand his previous arguments and provide new material.

25. Pp. 148-50, 196-202.

26. Pp. 187-92.

27. Pp. 148-50, 189-96.

28. Morris also claims that we must allow room for mercy because an absolutely evenhanded system would be harsher than our present arrangements. Pp.155-60. I shall consider this argument later. See notes 72-78 *infra* and accompanying text.

29. I shall hereafter refer to this as the "pure desert" or "desert" theory.

30. Pp. 149-50.

ousness of criminal offenses and to assign to each a punishment that the society at that time considers proportional to the seriousness of the offense.³¹ This is then the deserved punishment at that time and in that place.³² If Professor Morris wishes to call a resulting punishment "not undeserved," thus reflecting the lack of objective morality in setting punishments, so be it. I am not offended by such a procedure because it is no more arbitrary than the infinite line drawings in which the law constantly engages.

Second, Professor Morris supports his assault on equality in punishment by noting that everyone already accepts exceptions to equality such as exemplary punishments, pardon and amnesty (for conditions other than later-proved innocence), and selective enforcement.³³ Empirically, however, everyone does not accept such exceptions. First, I, for one, do not agree on the need or justification for such exceptions and would not allow them. Second, it is curious and illogical morally to claim that because a practice does exist, it should exist. Third, there are problems with each of these exceptions on the merits. For example, although it is impossible ever to treat persons perfectly as ends, it is particularly unfair to use a person as a means by punishing him more harshly than similar offenders simply to set an example. If one is a desert theorist, it offends the sense of justice to punish someone not for what he has done, but for the greater good, the increased deterrence that will supposedly result. Moreover, it is by no means certain that treating people in this way will produce a net social benefit.³⁴ A similar analysis also applies to the propriety of amnesty and pardon.

31. For instance, a survey by "[t]he National Survey of Crime Severity found that many diverse groups of people agree about the relative severity of specific crimes." Rand, Klaus, & Taylor, *The Criminal Event*, in U.S. DEP'T OF JUSTICE, *supra* note 16, at 4. There were some differences in how people rated the severity of various crimes—for example, crime victims assigned generally higher "severity scores" than non-victims—but people by and large agreed upon rankings. *Id.* For a retribution-based procedure for setting penalties, see Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726, 736-42 (1983).

32. The Supreme Court has recognized that principles of federalism and varying state interests can produce wide and constitutionally permissible differences between severity rankings and assigned punishments for crimes among the states. *Solem v. Helm*, 463 U.S. 277 (1983); *Rummell v. Estelle*, 445 U.S. 263, 284 (1980).

33. Pp. 187-92.

34. As Holmes noted, for example, society uses soldiers as a means to an end. O.W. HOLMES, JR., *THE COMMON LAW* 43 (1881). But the soldiers' dignity is not unduly offended because most people would agree to the need to have one's country defended.

Finally, the exercise of discretion produced by selective enforcement may be an inevitable evil of our criminal justice system, but I see no reason not to avoid it in sentencing. I should try drastically to limit selective enforcement at all levels of the system if the resources are available. It is of course true, as critics of determinate sentencing contend, that eliminating discretion at sentencing will not eliminate it at earlier points in the system.³⁵ Nevertheless, Professor Morris' view of the criminal justice system as a closed hydraulic model—where discretion closed off in one place must inevitably resurface elsewhere—is unlikely to be correct.³⁶ Nor is it likely that the appearance of equality in determinate sentencing will lull anyone into believing that massive amounts of arbitrary and unfair discretion no longer exist elsewhere in the system. Most important, it is fairer both to treat like cases alike and not to use persons as means to ends.³⁷

Professor Morris' final and most important proposition supporting inequality is that parsimonious sentencing is both just and practical. This theory has undeniable appeal because it seems to provide the best of both worlds—offenders get what they deserve, but only up to the amount necessary to achieve other worthy social ends. To implement his theory, Professor Morris proposes using a range of sentences that can be imposed for each crime. A range gives deserts their due by allowing for adjustments in punishment necessitated by the extraordinary diversity of factors, such as mental disorder, that can affect criminal behavior but that legislative definitions cannot possibly cover. It simultaneously allows for the realization of consequentialist goals such as maximizing deterrence. Moreover, a range permits the granting of mercy, which humanizes punishment and enriches the soul of the person dispensing it. Although the case for such a

By contrast, few would agree to being punished more harshly because unequal punishment would infringe upon their dignity and result in indeterminate social benefits.

35. See, e.g., Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

36. See *id.* at 577.

37. By "like cases," I mean cases that are legally alike in fitting the same category of criminal liability. Cases that are factually alike may of course be treated legally differently through the exercise of discretion at any stage of the system. In my view, this is an abuse that we should try to correct: Cases that are factually alike ought to be treated legally alike. At present, however, we have the worst of all worlds—too much arbitrary exercise of discretion at every stage.

sensible scheme seems unassailable,³⁸ for both theoretical and practical reasons the system would be more unjust and arbitrary than a more determinate scheme, and it would not guarantee that good consequences would flow from the "fine-tuning" it supposedly allows. We shall first see why Professor Morris' system of parsimonious, discretionary sentencing is unfair and then turn to an examination of why it is impractical.

The primary objection to the system is that it is unfair: Persons convicted of the same crime receive unequal punishments either for reasons that have nothing to do with their crime (general deterrence, for example) or because of mitigating or aggravating factors that lack persuasive justification and cannot be applied nonarbitrarily. Punishing unequally to achieve social goals uses defendants as means to an end, without respect for their dignity. Although the demands of equal justice may be "hazy,"³⁹ it is insufficient simply to assert that one can distinguish between a general justification for punishment and the justification for its distribution in individual cases.⁴⁰ One still must demonstrate that it is acceptable to treat persons as means in individual cases because desert sets fair minimal constraints on doing so in general. Professor Morris tries to prove this by claiming that his system would not treat defendants without regard to desert since no one would receive an undeserved punishment. This response does not succeed, as we shall see, because desert does not logically entail a range rather than a fixed sentence, and because morally important differences in desert cannot be nonarbitrarily distinguished among offenders to whom the range

38. Professor Morris consistently refers to indeterminate systems as "mature," in contrast, it would appear, to allegedly "immature" desert systems.

39. Pp. 180-81. Here Professor Morris is relying on H.L.A. Hart's use of the term "hazy." See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 24 (1968).

40. Here, again, Professor Morris relies heavily on a distinction Professor Hart draws most influentially. Hart, *supra* note 39, at 8-13. As Professor Morris fears quibbling with Aristotle (who believed that justice required that like cases be treated alike), P. 180, I fear quibbling with Professor Hart. Nevertheless, distinguishing between the general justification for punishment and the justification for its distribution seems to me rather hazy. If a general justifying principle of punishment exists, then the treatment of individual cases should be derived from it. If both the supposed general justifying aim (desert) and the distributive aim (utility) are to be considered in every case, I do not understand how this differs from the usual sort of mixed theory. But see G. FLETCHER, *RETHINKING CRIMINAL LAW* 418-19 (1978). Professor Hart's distinction does not allow the criminal justice theorist who proposes the mixed view to avoid having to justify his position.

allegedly applies. Defendants will not get their just deserts, and consequential concerns will predominate.

The criticism of indeterminacy that Professor Morris aims at determinate sentencing can be leveled fairly at his scheme as well, for under his scheme desert sets an upper maximum (beyond which punishment is too severe) and a lower minimum (beneath which punishment is too lenient, thus depreciating the seriousness of the offense).⁴¹ Professor Morris claims that since even the most well-defined crimes cover diverse types of behavior, only a *range* of not undeserved punishments can really encompass the just desert in a given case.⁴² A hierarchy of not undeserved punishments will thus be a hierarchy of ranges of punishments.

The problem, as Morris concedes, is that there are no firm criteria for setting the ranges of punishments.⁴³ Because there can be no objectively correct penalty for most crimes that is "too" severe, there will be little constraint on legislative judgment in setting the high end of the range. Moreover, if desert can vary within a range in proportion to the responsibility of the offender, it is difficult to understand why there should ever be a minimum penalty for any crime.⁴⁴ Imagine the case of a grossly psychotic defendant who would meet any legal test for insanity, but under Professor Morris' scheme must be held responsible for the crime he committed. Such a person would be barely responsible, even according to Morris, and one wonders why it would depreciate the seriousness of any offense, no matter how heinous, to assert that this person deserves little if any punishment. Everyone agrees that murder is dreadful, but I doubt that many people would consider it less dreadful if a grossly psychotic person with the *mens rea* for murder were incarcerated on grounds of safety and therapy rather than desert. The range of punishments for each crime may be so wide that desert will play little role, the opportunity for discretion will be enormous, and consequentialist goals will be the primary determinants of sentenc-

41. P. 198.

42. Pp. 150-52.

43. Pp. 151-52.

44. It is easier to understand why desert would set a maximum penalty: We believe with few exceptions that people do not deserve punishment that is disproportionately *greater* than the harm intended or risked, no matter how responsible and malevolent the actor might have been.

ing.⁴⁵ Professor Morris evidently does not wish to go quite so far, but he is unable to provide a solution to the problem.

The same values and political processes that can set a fixed range of punishments for each crime can also set a fixed punishment for each crime. Because setting either a fixed amount or a range is a culturally relative outcome of a particular political process, indeterminacy problems exist in both cases. The range and any punishment within it will be as arbitrary as a fixed sentence. In one sense, of course, a range is more likely to capture the "correct" punishment than a fixed term, but this is so only if we foolishly believe that an objectively correct sanction exists.

In addition, Professor Morris implicitly assumes that defendants convicted of the same crime are more morally different than alike and therefore it would be unwise to punish them alike. But contrary to his assumption, claims for mitigation and aggravation of penalties on moral culpability grounds are primarily based on a desire for isonomy rather than anisonomy. The primary moral reason to adjust sentences within a range is to fit punishment more precisely to desert than a determinate system would permit. While this is a justifiable goal, it can succeed only if moral differences between offenders convicted of the same crime can accurately identify those differences and thus provide a nonarbitrary basis for differential punishment. But Professor Morris' argument does not sufficiently support the existence of such differences or the possibility of employing them nonarbitrarily.

All people have different endowments, histories, problems, personalities, and so on. For purposes of legal punishment, however, there is a sense in which all these differences are trivial. When considering the criminal's responsibility, we usually focus on all his problems, all the criminogenic reasons why obeying the law seemed so hard for him, and why offending the law seemed so inevitable. But suppose we ask the question in reverse: How hard is it not to offend the law? The criminal law sets very low standards; it asks very little of us. Further, a sensible and careful definition of substantive crimes and defenses can take important moral differences into account. Differences in rationality and myriad other factors affect whether a person offends or obeys the law. But except in extreme cases justifying a total defense such as insanity, duress, necessity, or self-defense, it is simply not that

45. Pp. 152, 202-05.

hard to obey.⁴⁶ Neither this sort of empirical claim nor its opposite is provable, but I believe my claim is more plausible. If so, all those defendants who do not warrant a full excuse may be far more alike than they are different. The great value of this assumption is that it treats people with respect and dignity rather than as helpless puppets buffeted by forces that rob them of responsibility for their deeds. St. Peter may wish to do greater "fine tuning," but the law should not.

Another way of capturing this intuition uses the sort of "lighthearted psychological reflections" Professor Morris employs.⁴⁷ He assures us that prisoners, who he claims are more sensible than his Chicago Law School colleagues, would object to disparate sentences, but that they would readily agree that at least they are all getting what they deserve.⁴⁸ Suppose we tell those wise citizen-prisoners who received the higher sentences that the reason the others received lesser terms for the same crime was that the others were "less together" mentally because their past histories were tougher.⁴⁹ My guess is that they would react very unpleasantly. Instead of "sensibly" and good-naturedly agreeing that, "Well, that's a good reason," my lighthearted reflective prediction is that, outraged, they would swear profusely and claim that "Everyone's got a story," because, in fact, everyone has. There is simply no defendant, no matter how privileged, for whom a convincingly sad tale cannot be told.⁵⁰ The heavily punished prisoners would say that they deserve the same punishment as others who committed the same crime. They are right: The strong norm of equality should not yield to the common and dignity-robbing assumption that differences in responsibility among the responsible are so great.

Professor Morris is uneasy about punishing those who deserve to be punished. He is constantly seeking, on both consequentialist and desert grounds, means to avoid punishing. We agree that no one should suffer for nothing, but causing people

46. See also G. FLETCHER, *supra* note 40, at 513-14. The discussion in the text is presented in expanded form in Morse, *supra* note 3, at 30-36.

47. P. 201.

48. For prisoners, the problem is that all of their peers are not being punished equally. Morris contends, however, that prisoners will agree that justice does not require equality of punishment. *Id.*

49. If this seems too colloquial, let me suggest that it is every bit as scientific as what could be claimed with more technical language.

50. For a full discussion of this point in the context of using psychodynamic formulations to tell the mitigating story, see Morse, *supra* note 13, at 1027-39.

to suffer for the crimes they have committed does not offend me. They suffer because they deserve it. It would be better if they did not have to suffer, but it would be better yet if they had not offended the law. This is not an arid, theoretical belief. Rather, it goes to the heart of what it means to be a responsible person in a world that cannot exist without vast amounts of restraint and forbearance towards our fellows.

If sentences are to be adjusted within ranges set in part according to culpability differences among defendants, fairness requires careful normative theories to tell us which factors should count and how much they should weigh in the balance. Without such theories and the practical guidance they provide, the arbitrariness of applying differential sentencing will sweep away any theoretical fairness. Yet *Madness and the Criminal Law* lacks such theories and guidance. For instance, Professor Morris assumes, as do many others, that mental abnormality ought to diminish responsibility. Except for once in passing,⁵¹ however, he does not explain why this should be so, nor does he ever tell us how much it should count, either by itself or in relation to other mitigating factors. Instead, although Professor Morris repeatedly uses the phrase "fine tuning" to characterize what sentencing judges would do,⁵² he seems comfortable with rough justice. He simply cannot be so cavalier about the actual apportioning of punishment, however. It is unsatisfactory to admit glibly that "[t]hough precise scaling of moral guilt is far beyond our capacities, a gross and generous weighing of fault is not."⁵³ Compared to the allegedly "hazy" demands of equal justice, Professor Morris' prescription is downright turbid. If responsibility and blameworthiness can be arrayed along a finely graded continuum, and if punishments within a range can be equally finely graded, there must be some standards for nonarbitrarily fixing sentences.

Professor Morris refers to systems that "take gross account of moral imperatives" as "mature," but inspecting one of his favorite examples, the Minnesota Sentencing Guidelines,⁵⁴ is not com-

51. P. 156 (referring to the mechanisms of "understanding and self-control" in an aside not related to mental disorder).

52. *E.g.*, pp. 159, 167, 168.

53. P. 152. Professor Morris also writes that "[A]ll we can do is to develop a rough gradation of clemency which will permit us to take some *gross account of moral imperatives*." P. 156 (emphasis added). *This* is a hazy prescription indeed. He is clearly ambivalent about "fine-tuning."

54. Pp. 172-76.

forting. In the abstract, the Guidelines are an excellent expression of the theory of indeterminate sentencing, but the examples Professor Morris provides of their actual use are chilling instances of the arbitrary exercise of discretion on vague grounds.⁵⁵ Rather than providing elaborate justifications for mitigation and the degree of mitigation, many of the reports are simply conclusions that beg the question to be answered: They assume that mental disorder and other factors justify mitigation, but they do not show why and how this should be done.

If the law should mitigate punishment in at least some cases, I believe there is only one fair solution: one grade of mitigation applicable to all crimes that carries a legislatively fixed reduction in sentence. In effect, there would be a new verdict of "guilty but partially responsible" that would reflect the jury's finding that the defendant committed the crime charged but that his capacity for self-control or rationality was substantially compromised at the time.⁵⁶ This verdict would lead to the imposition of the fixed, lower sentence. This is the most "fine tuning" that can realistically be accomplished. It also has the virtue of enhancing equal treatment. Nevertheless, it is not the preferable solution.

In sum, Professor Morris' system would operate arbitrarily and therefore unfairly. Although this objection should be conclusive to a desert or mixed theorist, the system might be saved by a consequentialist weighing that demonstrates that the beneficial social outcome of the system outweighs the unfairness. I do not believe, however, that Professor Morris can make good on his promise that consequentialist balancing will create a net social gain. Assuming that desert can at best provide a hierarchy of ranges of not undeserved sentences, can we "fine tune"

55. Pp. 174-75.

56. I previously proposed such a scheme as the preferred mode of dealing with the defense of partial responsibility produced by mental abnormality. Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J.L. & PSYCHIATRY 271, 291-96 (1979). If we adopt partial responsibility as a defense—a position I reject—the scheme described in the text need not be limited to partial responsibility produced by mental abnormality. In theory, partial responsibility should be available to any defendant whose responsibility or blameworthiness is nonculpably compromised for any reason. Hence, this scheme could handle all cases that would reasonably justify mitigation. A major objection to this scheme is that juries are not the appropriate body to decide on mitigation by gross and generous weighing; the sentencing judge, it is argued, can handle this task more sensibly. For the reasons I have given, however, the judge cannot perform this task nonarbitrarily. Thus, I prefer to leave the moral decision about mitigation to the body that decides on guilt or innocence—the jury—and I prefer that it be performed at the high visibility stage of the process, the trial, rather than at the low visibility sentencing stage.

sentences within the ranges in individual cases to achieve any net social benefits?

Society has a lot to do if it is to achieve social benefits in this way. First, we need some measure of the costs of treating like cases differently. These costs include the unfairness prisoners experience and the unfairness observers such as myself perceive. Human lives are at stake and unjustified disparities resulting from imprecision are costly, unjust, and unacceptable. It is not sufficient to contend that the inevitable disparities will not create injustice because all prisoners, whose sentences all fall somewhere in the not undeserved range, are receiving a not undeserved punishment. I think this rationalization will be scant consolation to defendants who receive sentences at the high end of what promise to be very broad ranges, and who can find no coherent normative or factual explanation for why ostensibly similar defendants received much lower sentences. The costs of treating like cases differently are very high, and I have no idea how to measure or weigh them. If Professor Morris knows how to measure these costs he is hiding the ball. Second, we need vast amounts of information about the effects of particular sentences or classes of sentences on crime rates. What practices produce how much deterrence? How much incapacitation of what percentage of which criminals will produce how much reduction in crime? Even in this era of sophisticated quantitative models and computers, our knowledge remains rudimentary, albeit accumulating.⁵⁷ For example, one could not conclude that selective enforcement now treats individual defendants fairly, and that on the basis of present knowledge the practice will produce a net social benefit.

The consequentialist weighing that Professor Morris proposes is not possible. Many of the most important costs cannot be measured in principle. Factors that perhaps can be measured in principle cannot be adequately measured in fact. The application of mitigating and aggravating factors according to a "gross and generous weighing of fault" will inevitably produce arbitrary exercises of discretion. Professor Morris' apparently sensible system simply cannot achieve its supposed advantages.⁵⁸ I prefer

57. See, e.g., P. GREENWOOD & A. ABRAHAMSE, *SELECTIVE INCAPACITATION* (1982).

58. Professor Morris can be charmingly, disarmingly honest. Discussing a hypothetical about sentencing, he writes that in some cases he would mitigate punishment without giving a reason in order to achieve a result he evidently thinks is more just. P.

to treat like cases alike.

B. *Madness and Punishment*

Professor Morris would allow the sentencing judge to use evidence of mental disorder to decrease or increase sentences within the not undeserved range for the crime charged. His justifications for doing so are not uniformly clear, however.

Let us first consider decreasing punishment. Professor Morris correctly claims that decreasing the punishment of abnormal offenders will not have negative effects on the deterrent, educative, or other consequential purposes of punishment.⁵⁹ But the gravamen of his contention seems to be that abnormal but criminally responsible offenders deserve less punishment than normal offenders convicted of the same crime. He simply assumes this is justifiable and only once in passing provides a reason why this should be so—because “the pride and passion of man relate to his mechanisms of understanding and self-control”⁶⁰ Understanding and self-control surely affect the assessment of responsibility,⁶¹ but why should mental disorder be treated specially? Indeed, Professor Morris is a leading exponent of the view that disordered persons should be held responsible for their crimes. If mental disorder is not special, we need a general theory of mitigation, instead of kindhearted but vague sentiments. Moreover, if an offender passes the threshold level of self-control and understanding necessary to be held responsible, why should the law consider any further differences?

We should note first that if problems with understanding and self-control, short of total excuse, are to count at all, they must operate at the time of the offense. But Professor Morris' position on this point is not clear. He recognizes that difficulties at the time of the offense should be considered, but apparently he also

196. This is an honest but extraordinary demonstration of the ways in which arbitrary results would occur because Morris' scheme has no defensible, coherent principles that have clear, determinate outcomes.

59. Pp. 154–55, 169.

60. P. 156. The full quotation is, “All we can do is to take cautious account of our growing through very imperfect understandings of how the pride and passions of man relate to his mechanisms of understanding and self-control to produce conduct.” Elsewhere, of course, Professor Morris suggests that mental disorder should have this effect because it exerts “undue criminogenic pressure” in some cases. Pp. 168–69. As we have seen, however, this rationale is fatally flawed. See notes 7–19 *supra* and accompanying text.

61. See notes 5–7 *supra* and accompanying text.

assumes that a deprived background or a history of difficulties should count as well.⁶² While such a move requires a normative theory linking life historical factors to the assessment of responsibility for acts, Professor Morris does not provide one.

If an actor is reasonably rational and in control at the time of the offense, why should his background, no matter how troubled it might have been, bear on his responsibility for the offense? As we saw earlier,⁶³ it cannot be because his unfortunate background caused his criminal behavior. Indeed, causal factors are not relevant to assessments of responsibility. Since background per se is irrelevant to responsibility, however, it cannot be used to diminish (or enhance) punishment on desert grounds. Although background may be useful in predicting dangerousness and may therefore be employed in a consequentialist weighing of the proper length of incapacitation, an offender deserves neither more nor less punishment because of his background.⁶⁴

Innumerable factors can affect an offender's understanding and self-control at the time he commits a crime. If the law were properly to consider the many gradations in these two behavioral factors, it would inquire at sentencing into the degree of rationality and self-control that the defendant possessed at the time of the offense, and adjust the punishment accordingly. Mental disorders would occupy no special place in such an inquiry; they would be simply one factor to be considered. Assessing degrees of rationality and self-control and nonarbitrarily assigning punishment within the range might pose insuperable practical problems, but would create no theoretical incoherence.

The problem with this fine tuning, once again, is the vision of people and the law that it presupposes. It treats people as incapable of meeting a minimum demand of civilized society: restraining themselves sufficiently to live peaceably with others. The opposite vision—that we are all capable of obeying the law, including most mentally disordered persons—is both possible and more respectful, however. The law can consider relevant moral differences in the definitions of different crimes and defenses.

62. Pp. 62, 168–69.

63. See notes 13–19 *supra* and accompanying text.

64. Another reason to consider the offender's background and other factors not directly related to the offense is to justify granting mercy. See notes 72–78 *infra* and accompanying text.

Although there are difficult problems with using mental disorder to decrease punishment, considerations of desert cause even greater problems when used to enhance punishment. Professor Morris' consequentialist argument is theoretically sound. Whether the defendant's mental disorder increases his dangerousness and thereby justifies longer incarceration is an empirical question that can be answered by studies that, by controlling for other factors, allow the independent contribution of mental disorder to dangerousness to emerge. Professor Morris would not allow the presence of mental disorder to enhance punishment unless such an independent contribution to dangerousness could be demonstrated.⁶⁵ This is precisely the right approach. But since the best evidence demonstrates that mental disorder per se rarely if ever enhances dangerousness,⁶⁶ Morris' system would not allow consequentialist-based enhancement.

Professor Morris would allow enhancement of punishment, however, because "desert itself may be conditioned by fear, and the mentally ill may properly or improperly be more feared in relation to criminal behavior than those who are not mentally ill."⁶⁷ Professor Morris further explains that:

The societal face of a deserved punishment expresses fear of the criminal among other sentiments. Irrational behavior that is not easily explained or is seen as out of control tends to be more feared than similar behavior that is thought to be planned and rationally controlled. And that those fears help to define the deserved punishment . . . requires no analysis; brief introspection in which one empathizes with the victim suffices But clearly, being generative of irrational fear, the criminal's mental illness tends sometimes towards increasing his punishment.⁶⁸

Contrary to Professor Morris' blithe assertion, however, these propositions are hardly clear and require careful analysis.

Putting aside considerations of mental disorder for a moment, what does it mean to say that criminals who provoke greater fear deserve greater punishment? Our fear is certainly

65. Pp. 171-72.

66. Monahan & Steadman, *supra* note 17. Professor Morris claims that one can cautiously conclude that certain mental disorders increase the base expectancy rate for certain categories of crime. P. 164. Except when referring in general, and without citation, to "two streams of research," he cites no evidence to support this conclusion and, to the best of my knowledge, no reliable and valid studies to support it are available.

67. P. 161.

68. Pp. 161-62.

greater of those who commit more serious, or fearsome, crimes, and this is reflected already in the rank ordering of the seriousness of crimes and punishments. Similarly, we fear more those who commit crimes in particularly fearsome ways. Thus, it makes sense to say that a criminal deserves more punishment because he has done something more heinous than someone who committed the same crime in a less fearsome fashion.⁶⁹

Professor Morris does not seem to have either of these two cases in mind, however. What he is apparently referring to is the case of an especially dangerous type of criminal who, because of his prior record or some other factor, is likely to offend again. Increasing such a criminal's punishment on consequentialist grounds is logical, but he does not *deserve* more punishment.⁷⁰ He has not *done* anything worse than another defendant accused of the same crime; he is being punished for who he is rather than for what he has done. This is a strange meaning of desert that I doubt even Professor Morris would accept.⁷¹

Professor Morris' problem becomes even greater when we consider the role of mental disorder in producing fear. Assume either that a crazy person commits a crime in a scary way or that a defendant arguably deserves more punishment because he is a scary type of person. It simply does not follow that some mentally disordered people *deserve* heightened punishment because they are especially frightening. The reason is that the cause of their frightening irrationality—mental disorder—is beyond their control. Professor Morris accepts this claim by contending that mental disorder decreases desert. He bases this contention on the assumption that irrationality is not the fault of the mentally disordered. He cannot have it both ways, however. If mentally disordered people are powerless to prevent their fearsomeness,

69. This could be dealt with by proper definitions of crimes rather than by adjustments in sentencing.

70. Some theorists have tried to justify recidivist statutes on desert grounds. See, e.g., von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591 (1981). I find these arguments unpersuasive. If a person has already received the deserved punishment for what he has done, I do not see why the commission of a past crime should enhance his deserved punishment for further deeds.

71. Professor Morris never addresses whether desert justifies considering a criminal's prior criminal record at sentencing. In making his case for anisonomy, however, he assumes in order to clarify the issues that such a justification exists. Pp. 184–86. The tenor of the discussion leads me to believe that he rejects the justifications given, p. 185, and would rely on his own scheme solely on the ground that creating fear produces greater desert. See p. 163.

one cannot claim that they deserve increased punishment for it. Professor Morris' reference to empathy with the victim as a ground for desert-based enhancement is a final logical gaffe. One might empathize with the victim of a rabid dog's attack, but that empathy, and fear of the dog, hardly lead to the conclusion that the dog "deserves" punishment. It should be cured or destroyed, of course, but not because it is morally at fault.

Thus, Professor Morris must rely on consequentialist arguments for increasing punishment on the basis of fear, especially where the fearsomeness is a product of mental disorder.

C. *Mercy*

Mercy is Norval Morris' "fudge factor," argued for at various stages of the exposition.⁷² It is the most mystifying part of the book because Morris never tells us what mercy is and under what conditions it should be granted. He quotes approvingly from a recent papal encyclical that movingly says, in effect, that justice should be tempered by mercy.⁷³ When this sort of pronouncement comes from the Pope, it does not cause any problems, but when a criminal lawyer asks us to adopt it as a guiding principle, we are entitled to ask for more than uplifting sentiments.

What is mercy? It is not the decrease in punishment that follows from a finding that an offender deserves less punishment or that a lesser punishment will create a social gain, although all of Professor Morris' examples are of this standard sort. Consulting the philosophical literature does not provide definitional and conceptual clarification of the term "mercy."⁷⁴ As important as the topic seems to be, the literature is sparse, and scholars rarely agree. Nor is much of the literature sufficiently specific to help practical persons like Professor Morris, who wish to affect decisionmakers. All that remains is the commonsensical notion that to exercise mercy is to decrease a person's punishment or suffering beyond what the usual desert or consequentialist justifications would dictate; we punish less because we feel sorry for the person being punished. Professor Morris claims that there is a

72. *E.g.*, pp. 155-60. My discussion addresses those pages unless otherwise noted.

73. P. 156.

74. *See, e.g.*, Card, *On Mercy*, 81 *PHIL. REV.* 182 (1972); Smart, *Mercy*, 43 *PHIL.* 345 (1968); Sterba, *Can a Person Deserve Mercy?*, 10 *J. SOC. PHIL.* 11 (1979). *See also* Hestevold, *Disjunctive Desert*, 20 *AM. PHIL. Q.* 357, 361-62 (1983) (exercise of mercy must be arbitrary).

"compelling need for mercy in all human relationships, but most particularly in the relationship where the social collectivity is imposing punishment on the wrongdoer."⁷⁵ Even assuming that he is correct on this point, however, can the law properly express the need for mercy?

Professor Morris asks, "If we all got our just deserts, who escapes the rack?"⁷⁶ He claims that an absolutely evenhanded system that punishes legally alike cases alike would be far harsher than our present system. He contends that although it would be theoretically possible to have mercifully lenient, legislatively fixed punishments for individual crimes, it would be impossible in such a system to be merciful in individual cases because no one would escape punishment. Moreover, Professor Morris correctly believes that legislatures are unlikely to make determinate sentences merciful. Rather, they are inclined to make fixed terms quite harsh. Thus, if the burden of the criminal justice system currently falls disproportionately on the underprivileged and minorities, it would be even greater under a determinate sentencing scheme in which everybody got his or her fixed (and probably harsh) just deserts.⁷⁷ Professor Morris argues that a system that allows for individual dispensations of mercy would cause less net suffering to disadvantaged persons, even if mercy were not dispensed evenhandedly. He reaches what I believe is a vastly overstated conclusion: A society that punishes without parsimony and clemency "creates an intolerable engine of tyranny."⁷⁸

Professor Morris confuses parsimony and mercy. Reducing sentences for consequentialist or desert reasons is not the exercise of mercy. Furthermore, why is a system that punishes all those who deserve it "an intolerable engine of tyranny"? Punishment should not be unfairly harsh, but it is not unfair to punish justly a defendant who has been fairly convicted of an offense. Professor Morris apparently assumes that there is something wrong with punishing the guilty. I, on the other hand, wish we were able to punish them more often. I simply do not share Pro-

75. P. 155.

76. *Id.*

77. Some have argued against determinate sentences on the ground that the legislature can easily make the scheme harsher simply by increasing the penalties. This argument proves too much, however. A legislature can easily increase both ends of the not undeserved range, and, if Professor Morris is correct about the legislative tendency towards harshness, it would be quite likely to do so.

78. P. 155.

fessor Morris' assumption that deserving offenders should not be punished because punishment hurts. The purpose of retributive punishment is precisely to cause those who deserve punishment to suffer proportionately. There is no intolerable tyranny in such a system.⁷⁹

Finally, Professor Morris is so worried about the harshness of a pure just deserts system that he claims that discretion must be retained. We have already seen that there are vast and inevitable problems of arbitrariness if we try to exercise discretion on grounds of either desert or utility. The standards for exercising discretion on these grounds are extraordinarily precise, however, compared to the standards that would guide Professor Morris' exercise of mercy. Indeed, as Professor Morris recognizes, discretion would probably be exercised most unfavorably with regard to disadvantaged persons. Moreover, suppose, contrary to the experience of the past two decades, increased numbers of "law and order" judges were appointed to the trial bench. Such judges would be unfavorably disposed to granting mercy and would sentence defendants consistently to the high ends of the ranges.

A regime of broad ranges of penalties in which judges were charged with exercising mercy in appropriate cases would be one of "no holds barred" arbitrariness. The law cannot engage in such an enterprise without compromising its legitimacy. If the need for mercy is compelling, then mercy must be exercised privately, driven by generosity of the soul. Granting mercy cannot be the law's business, and Professor Morris provides no guidelines to convince us that it should be.

D. *Defining Crimes and Justice: "The Brothel Boy" Reconsidered*

Professor Morris denies the law's ability to define crimes and defenses with sufficient moral and legal precision to justify punishing those convicted of the same crime alike. He therefore suggests ranges of not undeserved sentences and must accept all the problems they create. I believe, however, that crimes and defenses can be defined with sufficient precision morally to support equal punishment. Careful attention to mens rea, relevant cir-

79. One might argue that the intolerably inhumane conditions in many of our jails and prisons produces the tyranny complained of. If the unfairness of exposing prisoners to such conditions, rather than the theoretically just grounds for punishment, is what is really at stake, society should confront this problem directly.

cumstances, and justifying and excusing conditions can capture the important moral differences among criminals that the law should recognize. Other differences in personal characteristics and circumstances are real but not legally important. No matter how precisely crimes and defenses are defined, of course, there will occasionally be substantial differences in culpability between two defendants convicted of the same relatively precisely defined crime. In such cases, punishing the same will create, or appear to create, injustice. Less injustice will result, however, than the arbitrary exercise of discretion that Professor Morris' system inevitably will produce.

Professor Morris provides an excellent example of my thesis in his opening chapter, "The Brothel Boy," a short story that depicts the tension between moral guilt and legal guilt and considers the role of mercy in punishment. Morris deftly, if a bit academically, tells a tale of crime and punishment set in rural Burma under the Raj.⁸⁰ In brief, a girl of twelve or thirteen is killed when she accidentally hits her head on a rock while being raped by the brothel boy, a somewhat retarded man of twenty. The son of a prostitute and an unknown father, the brothel boy had been brought up in the local brothel, where he earned his meager keep by operating the *punkah*, a type of fan. When Morris/Orwell, the assistant police superintendent, interviews him about the crime, all he says, repetitively, is, "Please sir, I paid, I'm sorry sir." The questions the story raises are whether the brothel boy is legally and morally guilty, and what punishment he deserves.

Morris/Orwell argues strenuously with his friend, Dr. Veraswami, that the boy is closer to innocence than most of us; his squalid background and low intelligence have conspired to rob him of responsibility and guilt. Although he admits that it is hard to develop coherent principles to guide the dispensation of mercy, Morris/Orwell believes that this is clearly a case for dispensing mercy. Veraswami vociferously disagrees. He argues that the boy knew what he was doing even if his comprehension was clouded by his weak intelligence and background. He must therefore be treated as a responsible person and hanged. Grant-

80. "The Brothel Boy" mimics and incorporates two of George Orwell's early autobiographical fictional essays. See Orwell, *A Hanging*, in 1 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 70 (S. Orwell & I. Angus eds. 1968); *Shooting an Elephant*, in *id.* at 235.

ing mercy is a task best left to the deity. Although Dr. Veraswami is sympathetic to the boy, he views the task of the law as justice, not mercy, and here justice requires the noose.⁸¹ In the end, the brothel boy hangs.

Despite Dr. Veraswami's contentions, the reader is clearly meant to sympathize with the brothel boy, to conclude that he is not fully responsible for the girl's death, and to feel revolted by the capital punishment. The result appears unjust, or at the very least, the case seems to demand the dispensation of mercy. The lesson of the story is that legal guilt and its predetermined punishments create unfair results.

I wish to commit a nasty deed upon Professor Morris' art—to treat his story as an examination hypothetical. I shall consider the story in the light of standard, modern homicide analysis, without redefining the law. If injustice was done, it is not primarily because legal and moral guilt are in tension and mercy was improperly withheld; rather, the brothel boy was improperly convicted of a crime he did not commit. Professor Morris has stacked the deck by manipulating our responses to the brothel boy.

The brothel boy did not kill the girl intentionally or recklessly. She hit her head accidentally while being raped. If the brothel boy is to be believed, he was not consciously aware that he was risking her death. At most, then, he is guilty of some form of negligent homicide, say, involuntary manslaughter, which typically carries very light penalties. Would a short term of imprisonment appear to be such an unfair punishment for the brothel boy's deed?

Criminal lawyers might argue that the brothel boy committed felony murder; raping the girl supplied the underlying felony that caused her death. Of course, felony murder is a form of

81. Veraswami also argues that the assistant superintendant must hang the boy because that is what both the British and the Burmese expect from a British official. This consequentialist argument based on role expectations is derived from Orwell's observations in *Shooting an Elephant*, *supra* note 80. There, Orwell wrote that as an officer in the Indian Imperial Police he felt compelled to destroy a valuable elephant that had run amok and killed a man. Although the elephant was calm and it was unnecessary to kill it, the villagers expected him to do so because his role required it. He killed the elephant.

It is impossible to know whether this incident actually happened to Orwell as he described it in the essay. This is a problem with much of Orwell's seemingly autobiographical writing. B. CRICK, *GEORGE ORWELL: A LIFE* 26, 166 (1980). This is why I refer to the essay as an "autobiographical fictional essay."

strict liability that the British abolished in 1957⁸² and that American jurisdictions have restricted or abolished because of the unfairness of the pristine rule.⁸³ The primary objection to punishing the brothel boy for felony murder is that it is unfair to punish anyone severely for a strict liability crime. Moreover, the brothel boy may not even be guilty of felony murder. One of the elements of the underlying felony of rape is that the defendant knew, intended, or, at the very least, was aware of a risk that the victim did not consent. Here, for various reasons, the brothel boy apparently believed that the victim was a prostitute who was not really resisting.⁸⁴ I am more inclined to believe this claim than the allegations of the defendants in the infamous *Morgan* case,⁸⁵ who claimed that they honestly believed the resisting victim consented to their vile attentions. Thus, it is possible that the brothel boy is not guilty of rape or felony murder unless the crucial mental element in rape is, at most, negligence. But such a harsh mens rea rule contrasts starkly with the modern trend towards subjective liability, and Professor Morris properly rejects it.⁸⁶

82. Homicide Act, 1957, 5 & 6 Eliz. 2, ch.11, § 1(1).

83. California, for instance, developed a very rich set of limitations. See *People v. Ireland*, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969) (merger rule); *People v. Phillips*, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966) (felony murder limited to underlying felonies that are "inherently dangerous"); *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965) (killing must be committed by the felon or an accomplice).

84. Conceivably, a jurisdiction that employs the artificial and confusing distinction between specific and general intent might exclude the evidence that mens rea was absent on the ground that rape is a general intent crime and evidence of mental abnormality is not admissible to negate general intent. Moreover, some jurisdictions prohibit the admission of evidence of mental abnormality to negate the mens rea of any crime. See *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982). Such limiting rules are totally misguided and perhaps unconstitutional; Professor Morris rightly rejects them. Pp. 65, 70. A full discussion of these points is presented in Morse, *supra* note 3, at 5-7, 15-16.

85. *Regina v. Morgan*, 1976 A.C. 182 (H.L.). Later legislation made clear that rape could be committed if the defendant was reckless about consent. Sexual Offenses (Amendment) Act, 1976, ch. 82, § 1(1). Recklessness is clearly a subjective mens rea, however.

86. P. 71. Modern criminal law doctrine, as exemplified by the *Model Penal Code*, increasingly bases blameworthiness and criminal liability on a defendant's actual, subjective mental state. See also note 85 *supra*. This trend has generated significant debate, however. See Temkin, *The Limits of Reckless Rape*, 1983 CRIM. L. REV. 5; Wells, *Swallowing the Subjectivist Bug*, 1982 CRIM. L. REV. 209. Moreover, there is an argument that the British have retreated somewhat from the broad "subjectivism" of *Morgan*. See Cowley, *The Retreat from Morgan*, 1982 CRIM. L. REV. 198 (decrying the retreat). See generally Smith, *Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England*, 27 VILL. L.

We can even go one step further. If the brothel boy's intelligence was sufficiently low, conceivably he knew neither of the nature and quality of his act (was it intercourse with a prostitute or rape of an innocent stranger?) nor that it was wrong. Thus, he might have been totally exonerated, albeit then to face a fate worse than prison and perhaps worse than the noose—lifelong commitment to a Burmese mental hospital. Of course, since Professor Morris would abolish the insanity defense, this possibility would not be available to the brothel boy in Morris' reformed, "merciful" system.

Professor Morris further clouds the issues by imposing capital punishment on the brothel boy. Even if, contrary to my analysis, the brothel boy could be convicted of the highest degree of murder, it is unlikely that he would be executed. The British have abolished capital punishment, and even in the United States the sentencing authority must consider all mitigating factors.⁸⁷ Moreover, many state capital punishment statutes specifically provide that mental defect is a mitigating factor.⁸⁸ Professor Morris might counter that my rejection of disparate sentences for the same crime precludes me from arguing for mitigation on behalf of the brothel boy. But capital punishment is improper for *any* crime. Imposing capital punishment is simply a distraction in this case, for no fair modern system would convict the brothel boy of capital murder in the first place.

It was unjust to hang the brothel boy, but not because mercy should have mitigated the rigors of the allegedly condign punishment for murder. The brothel boy should have received a much lesser penalty because he was guilty only of a much lesser crime.⁸⁹ And Professor Morris could not reject this analysis be-

REV. 1179 (1982) (arguing for the subjectivist view). Nevertheless, except for the retention of the felony murder doctrine, liability is increasingly subjective in the United States, and the British retreat is insubstantial. See *W.(A Minor) v. Dolbey*, 1983 CRIM. L. REV. 681.

87. *Lockett v. Ohio*, 438 U.S. 586 (1978). Furthermore, if the brothel boy could be convicted of felony murder, it is likely, although not certain, that the death penalty could not be constitutionally applied to him. *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the death penalty cannot be applied to a felony murderer who killed entirely accidentally).

88. *E.g.*, CAL. PENAL CODE § 190.3(h) (Deering 1984).

89. The brothel boy would most likely be guilty of involuntary manslaughter, but if the jurisdiction requires subjective liability for that crime, he might not be guilty of any form of homicide. He might be guilty of battery if that crime could be committed negligently.

cause elsewhere he prescribes just this sort of careful attention to mens rea as a proper substitute for the insanity defense.⁹⁰

Nor must we accept Burmese conditions and British law as they were then. Tensions between moral guilt and legal guilt can be resolved in two ways: by granting mercy when legal guilt is too harsh, or by reforming the law to avoid unjust attributions of guilt and punishment. It is preferable to try the latter approach first because definitions of crimes and defenses should accurately and specifically reflect our attributions of blameworthiness. If the criminal law is to maintain respect, we cannot postpone attributing blameworthiness until sentencing.

Sensible definitions of crimes that pay careful attention to mens rea and specific circumstances, coupled with a humane array of defenses, will allow the law to distinguish morally distinct cases. This approach clearly works in the case of "The Brothel Boy." Differences will still exist among offenders and the ways they commit their crimes, but for purposes of the law, offenders will be sufficiently morally alike to justify equal punishment. This will not be a perfect solution, but the law cannot achieve perfection. If like cases are treated alike, however, this is a good start.

III. CONCLUSION

Madness and the Criminal Law is a major jurisprudential statement of the proper contours of criminal responsibility and punishment and their relationship to mental disorder. It forces all concerned with these problems to reexamine their assumptions and recommendations. Although a theoretical book, it consistently emphasizes the practical problems that theory should inform.⁹¹ In this review, I have concentrated on those aspects of the book that seem most problematic. This approach necessarily and unfortunately ignores the many issues about which I believe

90. *E.g.*, pp. 65–67, 70–72. It may seem that my analysis of mens rea supports Professor Morris' argument for abolishing the insanity defense. But it does not do so for at least two reasons. First, the case presents a highly unusual and artificial instance in which mens rea is substantially negated. Although this is possible in theory, in practice it virtually never happens. Morse, *supra* note 3, at 38–44. The reason the brothel boy presents such a strong case for mitigation is precisely that his abnormality vitiates his subjective mens rea, the proper touchstone of culpability. Second, as I have been arguing, if the brothel boy is sufficiently mentally abnormal, he should not be convicted of any crime at all because it is unjust to hold him responsible.

91. On the other hand, Professor Morris often resorts to practical problems whenever a theoretical argument fails. This is perhaps most evident in his discussion of the insanity defense.

Professor Morris is exactly right. Nevertheless, he invites his readers to engage in debate with him, and it would be disrespectful to do otherwise. No commentator on crime and madness deserves our attention more than he.